GENERAL AIR FORCE COUNSEL

FRAUD FACTS

DEPUTY GENERAL COUNSEL (ACQUISITION) ***No. 2, October 1996***

This is the second edition of ***FRAUD FACTS***, a biannual newsletter from the Air Force Deputy General Counsel (Acquisition) (SAF/GCQ). The purpose of the newsletter is to provide information and feedback to Acquisition Fraud Counsel (AFCs) at all levels concerning the ongoing operation of the Air Force's Procurement Fraud Remedies Program.

UNNECESSARY REMEDIES PLANS?

What do you do when you, the vigilant, fraud-fighting AFC, receive a tasking for a remedies plan you just don't believe should be opened?

Maybe the investigation is in its preliminary stages. Maybe the activity that looked like fraud was not actually fraud. Maybe it has nothing to do with your programs. Maybe the investigative agent is resistant to providing information for operational security reasons. Whatever the reason, if you believe we don't need to open a remedies plan on a case, call or e-mail SAF/GCQ and talk to us about it. Likewise, if you learn of a new fraud case (whether it meets the criteria for a significant fraud case as defined in AFI 51-1101 or not) please let us know. Let's help each other make the remedies program work.

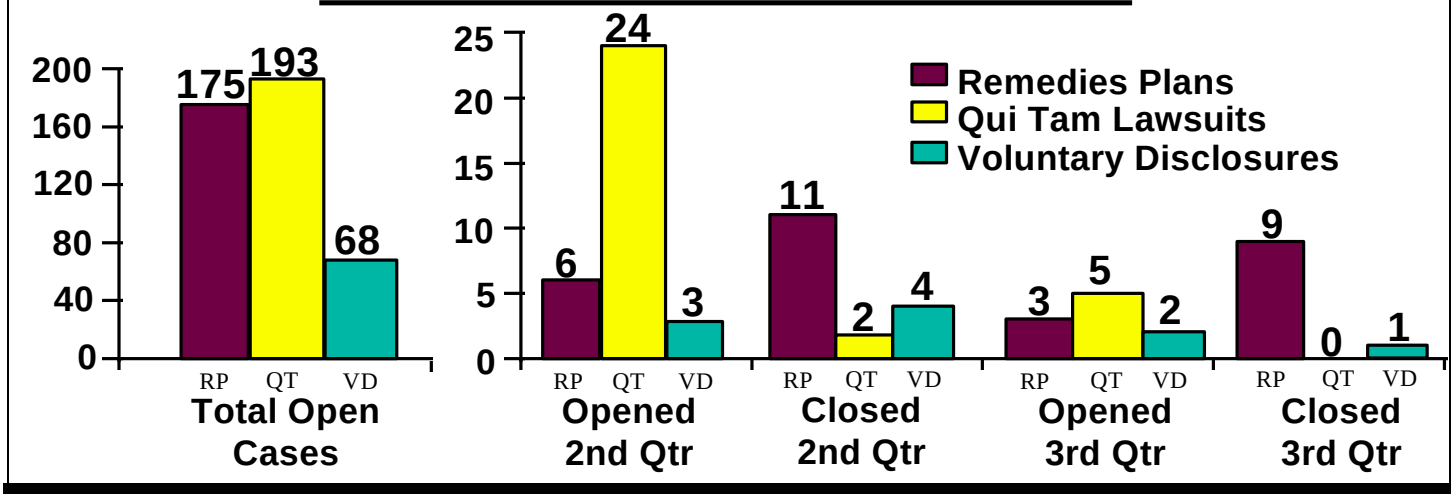
NEWS & NOTES

♦ Approximately 20 Air Force attorneys attended the Army JAG School's Procurement Fraud Course in September. The course included sessions on criminal, civil, and administrative remedies, as well as the coordination of remedies process. Civil and criminal attorneys from DoJ and suspension and debarment officials spoke about their areas of expertise. The Air Force held a break-out session and used the time to discuss some recent issues affecting the procurement fraud remedies program. We found the course useful and encourage AFCs to attend this course in the future . . .

♦ *Rick Castiglia*, a former fraud remedies attorney at SAF/GCQ, is now an associate with a law firm in Washington, DC . . .

♦ If you have questions, comments, or would like to write a short article for the next issue of ***FRAUD FACTS***, please call or send us an e-mail

AIR FORCE FRAUD CASES CY96



message.

EUREKA'S GOLD RUSH IS OVER

A coordinated effort by AFCs *John Thompson* and his predecessor *Major Mark Land* at McClellan AFB, AFOSI agents *David Stern* and his predecessor *Robert Bennett* of Det. 112B, and Contracting Officer *Janna Buwalda* of SM-ALC/PKOP has lead to the pursuit of several remedies against Eureka Laboratories, Inc., a contractor that falsified laboratory tests.

Eureka, a subcontractor on two Air Force environmental contracts, misrepresented the results of equipment calibration tests and falsified results of environmental samples. The company and its principals were convicted of conspiracy, false claims, concealment of a material fact by trick, scheme and device, and making and using false documents. The sentences included jail for the individuals involved and a $1.5 million fine for the company. Eureka was ordered to pay $322,422.95 in restitution (of which the Air Force received $245,000), and the company and individuals involved were debarred by the EPA. Finally, the contracting officer plans to file a claim or an offset against the prime contractor for any losses not recovered from the restitution paid by Eureka.

SUPREMES MULL CERT IN 3 QUI TAMS

What are the hot issues in the world of *qui tam* litigation today? Three cases that have recently made their way to the U.S. Supreme Court present challenging questions in this area of law. The Supremes recently granted a petition for certiorari in Hughes Aircraft v. U.S. ex rel. Schumer and denied certiorari in Northrop Grumman v. U.S. ex rel. Green and U.S. ex rel. Killingsworth v. Northrop Corp.

In Schumer, the Supreme Court will review whether monetary damage to the government is necessary to bring a *qui tam* lawsuit and whether a relator who learns of alleged fraud through government audits given to defendant's employees or releasable under FOIA is an original source for the purposes of filing a *qui tam*. Hughes Aircraft Co. v. U.S. ex rel. Schumer, 65 U.S.L.W. (1996). The case began with an investigation into Hughes' auditing practices under B-2 and F-15 radar programs. Following a 1986 investigative audit, the U.S. withheld $15.4 million in costs from Hughes. In 1989, Schumer filed his *qui tam*. The government declined to intervene and, later, found that Hughes' suspect auditing practices had, in fact, saved the government money.

Schumer pursued the case on his own and appealed the District Court's decision to grant Hughes' motion for summary judgment. U.S. ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512 (1995). On appeal, the 9th Circuit rejected Hughes' argument that, since Schumer obtained his information through FOIA and government audit reports which were circulated among contractor employees who were not involved in the alleged fraud, he was not an original source. In its petition for certiorari, Hughes also argues that the 9th Circuit misinterpreted the False Claims Act in finding Schumer's allegations stated a cause of action even though the alleged misconduct saved the government money.

In Green, the issue on appeal was whether settlement of an individuals wrongful termination suit can be enforced to bar that individual from filing a *qui tam* lawsuit. Green, a former Northrop employee, filed a complaint in state court against Northrop alleging a number of state law claims stemming from his termination by Northrop. Green had worked as a criminal investigator for Northrop and had uncovered evidence that the company double charged the Air Force for equipment procured for the B-2 bomber. Green maintained that he was terminated for bringing this information to Northrop officials and seeking advice from an attorney. The parties settled that action and Green signed an agreement to release the company from any claims he may have had against Northrop arising out of his employment with the company.

Following the settlement, Green brought a *qui tam* action against Northrop. The U.S. declined to intervene and Northrop filed a motion for summary judgment stating that its settlement with Green precluded him from bringing a *qui tam* suit against the company. The district court granted

Northrop's motion for summary judgment. Green appealed to the 9th Circuit, which overturned the ruling of the lower court and determined that the agreement between Northrop and Green cannot, as a matter of public policy, be enforced to bar Green from bringing a *qui tam* lawsuit. The Supreme Court has decided to let the 9th Circuit's ruling stand. U.S. ex rel. Green v. Northrop Corp., 59 F.3d 953 (9th Cir. 1995), cert. denied, 116 S.Ct. 2550 (1996).

In Killingsworth, a procedural morass, the government originally declined to intervene in the *qui tam* lawsuit but later reconsidered and attempted to intervene based upon newly-discovered evidence which the relator may have withheld from the government. The District Court did not allow the United States to intervene and the court approved a settlement between the relator and the defendant over the objections of the United States. The case went to the 9th Circuit twice (the first time it was remanded to the District Court) and the Supreme Court denied the United States' petition for certiorari. U.S. ex rel. Killingsworth v. Northrop Corp., 1995 U.S. App. LEXIS 31563 (9th Cir. 1995), cert. denied, 65 U.S.L.W. 3293 (1996).

The principal issue in Killingsworth was whether the government had the right to block the dismissal of a *qui tam* lawsuit in which the Government has not intervened after the relator and defendant have agreed to a settlement. The FCA specifically states that a *qui tam* action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." However, the 9th Circuit held the consent provision is only applicable during the initial 60 days (or longer if an extension is granted) after the complaint is filed, when the case is under seal and the government has not yet determined whether it will intervene. U.S. ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715, 721 (9th Cir. 1994).

WORKING WITH AUSAs

One of the many hats that an AFC must wear is that of a contract law adviser to the Air Force's representatives in criminal and civil prosecutions, Assistant United States Attorneys (AUSAs). AUSAs are usually generalists and often have little or no background in government contracts. Therefore, its imperative that AFCs get involved in criminal and civil procurement fraud cases early and point out or clarify any contractual issues that may otherwise be overlooked or confused.

One recent example of an AUSA's lack of government contract experience directly affecting the disposition of a criminal false claims case occurred during the negotiation of a pre-trial diversion agreement--an agreement whereby the U.S. won't prosecute if the party under investigation stays out of trouble. The AUSA never consulted the AFC on the efficacy of the agreement and, as a result, included language allowing the contractor to amend and resubmit the claim for termination costs for which the company was investigated. Although the contractor's claim may not have been forfeited under 28 U.S.C. § 2514 (a claim before the Court of Federal Claims shall be forfeited to the United States by any person who defrauds or attempts to defraud the United States in the proof of the claim), had the AUSA been aware of the statute, perhaps he would have negotiated an agreement which precluded the contractor from re-submitting its claim. Instead, the contractor has taken a second bite at the apple and submitted a claim for costs to the Air Force.

AFOSI COMMAND ACQUISITION ADVISOR

We welcome *Major Bud Campbell* to the Air Force fraud fighting team. Maj Campbell recently arrived at AFOSI headquarters to be the Command Acquisition Advisor. Although you may never have an opportunity to speak with Maj Campbell, you may hear his name or see his memos when working with AFOSI agents. Maj Campbell is a contracting officer assigned to AFOSI to advise agents on contract issues. His predecessors have proven to be valuable resources for AFOSI agents and we're sure that agents will continue to look to Maj Campbell for guidance. Maj Campbell can be reached at DSN 297-5436 or (202) 767-5436.

NOTE to AFCs: The Command Acquisition Advisor provides written explanations of contract issues to AFOSI agents regarding specific cases when requested. These memos are for internal AFOSI use and are not to replace legal opinions from the AFC nor are they to be given to DoJ.

FACT-BASED DEBARMENT & SUSPENSION

By Jim Cohen, SAF/GCR

Many attorneys and contracting officers view suspension and debarment as viable remedies only when there has been an indictment or conviction. While it is true that the majority of our suspension and debarment actions are based upon criminal prosecution, fact-based actions constitute a significant portion of the actions, particularly the debarments, taken by our office. In FY95, 36 of the Air Force's 105 debarment actions were based, in whole or in part, on facts other than a conviction. Fact-based debarments arise in a variety of ways. Most frequently, fact-based cases are referred to SAF/GCR by AFCs, investigators, or DLA fraud counsel following declination by the United States Attorney's office. In one recent case, we proposed an overseas contractor for debarment after he provided a gratuity (a Mercedes) to a government employee with whom the contractor had a working relationship. Although the gratuity didn't violate the host nation's laws or business practices and the United States Attorney chose not to pursue any remedies against the contractor, we felt that the action was necessary to protect the government's business interests.

In another recent case, a small carpet contractor improperly retained Government Furnished Equipment (carpet) and sold it back to the Air Force when a job on base called for matching carpet. Because of the low dollar amount, the United States Attorney declined prosecution. The base referred the case to us and we debarred the contractor.

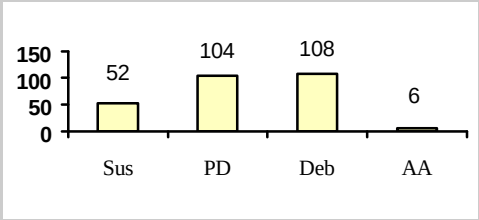
A third type of conduct which has prompted fact-based debarment action by our office stems from false statements in bids. In two recent cases we felt that the false statements struck directly at the heart of the integrity of the procurement process. The first involved a company that was not even registered with the Secretary of State where they purported to do business. The second company falsified its experience and improperly certified that none of its principals had been debarred within the past three years. We took fact-based actions against these contractors.

The Air Force does not take debarment action in every fact-based case it gets. Often our concerns are the same as those of the United States Attorney: the government in some way condoned or participated in the activity that may provide the basis for debarment or the evidence just isn't there. Other times, we discover the government, often the same base, has continued to contract with or accept bids from the contractor after the misconduct was known. These factors significantly weaken our factual basis for suspension or debarment.

The key to successfully pursuing appropriate fact-based suspension and debarment actions is to talk to us. We want to work with AFCs and contracting officers to help them avoid unnecessarily spending a lot of time preparing suspension/debarment packages that aren't going anywhere once we get them. If you have a case that you believe is appropriate for a fact-based debarment, call me at (703) 693-9819 (DSN 223-9819). My fax number is (703) 697-4340 (DSN 227-4340).

SUSPENSION & DEBARMENT STATS

The chart below shows Air Force suspensions, proposed debarments, debarments, and administrative agreements during FY96. 17 of the Air Force's 160 suspension/debarment actions were based on facts other than an indictment or a conviction.

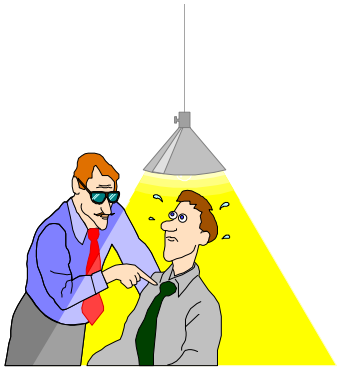


SOME PEOPLE NEVER GIVE UP!

One of the major goals of the procurement fraud remedies program is to ensure that contractors who lack present responsibility are suspended or debarred from contracting with the

Federal government. When a contractor is suspended or debarred, its name is placed on a list published by GSA. This list is to be checked by contracting officers before award of a contract. Unfortunately, suspended or debarred contractors sometimes change their names in order to receive contract awards.

Through the diligent efforts of AFOSI Special Agents including *Chris Bolt, Mark Burwell, William Corbitt, Sondra Glass, Wayne Leaders, Chris Lund* and *Rich Mennuti*, Air Force Attorneys such as *Capt Thomas Doyon, Michael Farr, Capt Leo Kight, John Merritt*, and *Milton Watkins*, and base contracting personnel including *Jackie Keys, Barbara Klein*, and *Norma Henson*, the Air Force has been keeping up with one such contractor who, on July 8, 1996, was convicted of fraud for a third time. Below is a chronology of the events leading to Aman Khan's third fraud conviction.



1991: In December 1991, Aman Khan was convicted of mail fraud and false claims.

1992: In July 1992, the Air Force proposed Mr. Khan, his wife Stella, and their business, Mechanical Logic Systems, Inc. (MLS), for debarment based on their failure to perform under Air Force contracts.

September 1992 was a bad month for Mr. Khan. He was convicted again, this time for filing income tax returns under fictitious names in order to receive refunds, sentenced to 1 year in prison and two years probation, and ordered to pay $72,099 in restitution. He was also indicted on seven felony counts in the Middle District of Georgia following an AFOSI investigation into MLS' submission of forged DD 250s to OC-ALC and WR-ALC.

In December, the Air Force converted the proposed debarments of Aman Khan, Stella Khan, and MLS to a period of debarment to run through July 21, 1995.

1993: In the Spring of 1993, OO-ALC, OC-ALC, WR-ALC began to receive solicitations from Advanced Aerospace International Company (AAIC). AAIC had the same address as MLS and its purported owner was a Mr. Anthony Fernandez. A Small Business Administration review of AAIC's application for a Certificate of Conformance revealed that the Khans were AAIC's officers and Mr. Fernandez, an immigrant from Pakistan, furnished false information regarding his past employment history, did not have a valid INS number, and, according to a check of his California driver's license, did not even exist as far as the State of California knew. The Khans subsequently sold AAIC to their defense attorney Michael Sayer and the company's name was changed to Advanced Aerospace, Inc. (AAI). Mr. Sayer was debarred by the Air Force until June 29, 1997.

In June, Aman Khan was again indicted as a result of AFOSI's continuing investigation into his submission of forged DD 250s--this time on 15 counts in the Western District of Oklahoma.

In November, the Oklahoma indictment was dismissed, the Georgia indictment was vacated, and the cases were combined. Additionally, a second, subsequent investigation was initiated by AFOSI to expand the scope of the initial allegations to include other conspirators and additional fraudulent activity such as the Khans' efforts to avoid debarment.

1994: In November 1994, AFOSI initiated a third investigation of the Khans. The investigation was based on allegations that AAI sold counterfeit aircraft engine compressor blades to DoD. The IRS was also investigating allegations that Khan filed false income tax returns through AAIC.

1995: In March 1995, SAF/GCR extended the debarments of Aman Khan, Stella Khan, and MLS, and added AAIC, AAI, and several aliases used by the Khans to the debarment list, until ***July 21, 2010!*** SAF/GCR based its actions on both Aman Khan's 1991 conviction and the Khans' efforts to circumvent their prior debarments.

In August, Aman Khan plead guilty to criminal informations charging four counts in the Central District of California, two counts in the Western District of Oklahoma, and four counts in the Middle District of Georgia.

1996: In July, Aman Khan was sentenced to 54 months prison, 3 years probation, and $698,305 restitution pursuant to a 21-count superseding information related to the forged DD 250s, the counterfeit parts scheme, seven federal and five state false tax returns, and passport fraud. SAF/GCR is currently considering extending the debarments again.

DLA FRAUD COUNSEL

At SAF/GCQ, we communicate with Fraud Counsel from the Defense Logistics Agency (DLA) on a regular basis to ensure the timely pursuit of Air Force remedies in cases handled primarily by DLA and to limit the amount of duplicated effort on the part of Air Force AFCs and DLA Fraud Counsel. To facilitate communication between DLA and Air Force fraud attorneys at the field level, we are providing the following list of DLA Fraud Counsel and their phone numbers:

DLA Headquarters
Richard N. Finnegan
Ft. Belvoir, VA
(703) 767-6077; DSN 427-6077

Defense Contract Management District East
Russell J. Geoffrey
Boston, MA
(617) 753-4343; DSN 955-4343

Defense Contract Management Commands

Jane Blumenthal-Stechman
Long Island, NY
(516) 228-5939

Mary Ross
Philadelphia, PA
(215) 737-4017

Jerome Hamilton
Dayton, OH
(513) 296-5070

Leigh Owens
Atlanta, GA
(404) 590-6264

Joseph S. Satagaj, Jr.
Dallas, TX
(214) 670-9241

Defense Contract Management District West
Carol L. Matsunaga
El Segundo, CA
(310) 335-4487; DSN 972-4487

Defense Contract Management Command
Kathryn B. Lindbeck
St. Louis, MO
(314) 331-5232; DSN 555-5232

Defense Supply Center Columbus
Mark Boyll, Anita Doran, and Matthew Geary
Columbus, OH
(614) 692-3284; DSN 850-3284

Defense Fuel Supply Center
Christine L. Poston
Ft. Belvoir, VA
(703) 767-5020; DSN 427-5020

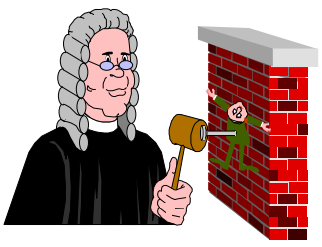
Defense Supply Center Richmond
Gerald Gliebe
Richmond, VA
(804) 279-4814; DSN 695-4814

Defense Industrial Supply Center
Elizabeth Perry
Philadelphia, PA
(215) 697-2739/40/41; DSN 442-2739/40/41

Defense Personnel Support Center
Walter F. Riess, Jr.
Philadelphia, PA
(717) 770-6310; DSN 977-6310

Defense Distribution Region West
Nancy C. Rusch
Stockton, CA
(209) 982-2026; DSN 462-2026

DLA Pacific
David Coker
Camp H.M. Smith, HI
(808) 477-6484



DLA Europe
Bruce Haefner
Michael Mahoney
Weisbaden, Germany
Loudwater, England
011-49-611-380-7556
011-44-149-445-0944

WHO'S WHO @ SAF/GCQ

The Procurement Fraud Remedies Program attorneys at SAF/GCQ are:

John A. Dodds
DoddsJ@af.pentagon.mil
Kathryn M. Burke
BurkeK@af.pentagon.mil
Richard C. Sofield
SofieldR@af.pentagon.mil
Tel: DSN 227-3900 or (703) 697-3900
Fax: DSN 227-3796 or (703) 697-3796